Supreme Court, U.S.
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No. 90-1353

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1991

MICHAEL SWEPSTON, PAM PADLEY, BARBARA SIECK, and BENITA LEVINGSTON,

Petitioners,

vs.

CLARK DAVENPORT SNELL, SHARON RUTH SNELL, JIM R. SNELL, BETH SNELL, JASON SNELL, BRITTANY SNELL, PATRICIA JEAN TURTLE, and JESSE SANDERS,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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STATEMENT OF FACTS MATERIAL TO THE CONSIDERATION OF THE QUESTIONS PRESENTED

Respondents' complaints against petitioners arose the evening of August 26, 1987 when three social workers from the Oklahoma Department of Human Services ("DHS"), including petitioners Barbara Sieck and Benita Levingston, accompanied by three uniformed officers of the Oklahoma City Police Department entered respondents' home without notice, rounded up the children living there, questioned Sharon Snell and searched the respondents' papers. Even though the police sergeant observed that, "the house was generally clean and neat" and he "saw no obvious indications of abuse or neglect," seven children were removed from the home for whom respondents Clark and Sharon Snell did not have custody papers signed by a judge. Snell et al. v. Tunnell et al., 920 F.2d 673, 684-85 (10th Cir. 1990) (Appendix 1 at 49-54).[1] Petitioners acted pursuant to an Ex Parte Order issued by Sidney Brown, Presiding Juvenile Judge of the District Court of Oklahoma County on the basis of the

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[1]Citation is to Appendix to the Petition for Writ of Certiorari.

Application prepared by petitioner Pam Padley, attorney for DHS, which included the false statements that DHS had received allegations of child prostitution and child pornography in the Snells' home and that "DHS has been unable to complete the child abuse investigation due to lack of cooperation by the Snells." Petitioners did not bring the Application with them when they entered respondents' home, nor did they inform respondents of these allegations. Snell, 920 F.2d at 685 (Appendix 1 at 54-55).

Padley testified that she had never prepared or filed such an application before and knew of no DHS precedent for such an application. Snell, 920 F.2d at 695 (Appendix 1 at 104). The Oklahoma Statutes and rules and regulations of DHS provide that a preliminary inquiry shall be conducted before a child is taken into custody, and that the district attorney is responsible for filing a petition based on the information discovered in the preliminary inquiry, if further action is necessary. In the enforcement of matters related to licensing of child care facilities, the Oklahoma Statutes

provide that action is to be taken by the district attorney or the attorney general. Snell, 920 F.2d at 689-90 (Appendix 1 at 73-77).

Respondents Sharon Snell, who is a registered nurse, and Clark Snell have been volunteers for the Jesus House, a shelter for the homeless in Oklahoma City, since 1982. Over the years, they provided a temporary home and summer camp experience for many children. In August 1987, the Snell household included the Snells' three adopted children, eight children for whom the Snells were legal guardians and seven children who were being cared for by the Snells at the request and with the written consent of their mothers, who were either incarcerated or living at the Jesus House.

Relations between the Snells and certain DHS employees had become strained over the years. DHS allegedly received complaints that the Snells had refused to return children to their parents and the Snells had complained that certain DHS child welfare workers had failed to adequately protect children. In April of 1987, two employees of the Licensing Division of DHS visited respondents' home and found that the Snells were not in violation of the Oklahoma Child

Care Facilities Licensing Act. Snell, 920 F.2d at 677-78 (Appendix 1 at 14-16).

In July 1987, a DHS Child Welfare Division social worker visited respondents in their home, and also talked with their neighbors, in connection with his investigation of an anonymous complaint of neglect and inadequate supervision of children in the Snell home. The Snells advised the worker that at that time there were 15 children residing in the home who were either their adopted children, children for whom they had been appointed legal guardians, or children whose mothers requested that the Snells care for them. They declined to respond to the worker's request for the names of all the children. The following is an excerpt from the worker's report:

> The interior of the home was remarkably clean and organized with this many children about the house. The worker counted 11 children in the house. The children were clean; appeared to be in good physical health and appropriately clothed. There was evidence of daily housekeeping activity. The older children were assigned age appropriate chores to be done on a daily basis. The children gave the appearance of being well fed and happy to be a part of this household.

Snell, 920 F.2d at 678 (Appendix 1 at 17).

The report, which was dated July 23, 1987 and signed by petitioner Michael Swepston, supervisor, was submitted to the Juvenile Division of the District Attorney's office. It recommended that additional investigation concerning possible criminal prosecution of "non-accidental physical and mental injury, sexual abuse or neglect appears indicated." The Court of Appeals for the Tenth Circuit found this recommendation "paradoxical given the fact the report makes no mention of such allegations." The district attorney took no action on the report because of lack of evidence to support the recommendation. In her deposition testimony, the District Attorney stated that the report provided plaintiffs in discovery differs from the original and omits allegations of child abuse, child pornography and child prostitution. Snell, 920 F.2d at 678; 681; 682-83 (Appendix 1 at 20, 31-32; 39-40).

Clark Snell complained to DHS that when the worker talked with neighbors, he made derogatory remarks about the Snells. A meeting was held on July 20, 1987 at DHS at which time Clark Snell met with petitioner Padley and other DHS supervisory personnel to

discuss his complaints about DHS. Snell, 920 F.2d at 678-79 (Appendix 1 at 20-21).

In late July and early August, DHS received three reports regarding the Snells, one from a neighbor who complained the children were not adequately supervised when at play; one from an in-law of the Snells' son who complained that the house was dirty and the children were neglected; and one narrative report from the DHS Children's Shelter that a retarded eleven-year-old boy, G.H., who had stayed temporarily at the Snells because his mother could not cope with him, said that Clark Snell had struck and kicked him and told him he could either go to jail, stay with the Snells, or be killed. G.H. had a well documented history with DHS of emotional disturbance prior to his stay in the Snell home. Prior to August 26th, the Snells told the DHS social worker who came to their home to interview them about G.H. that G.H.'s problems were beyond what the Snells could handle given their responsibilities to the other children in the home. Snell, 920 F.2d at 679 (Appendix 1 at 24).

Mary Asbury, District Supervisor, gave the three reports to petitioner Sieck who gave them to petitioner Levingston for investigation. The reports were not given priorities for investigation as required by DHS regulations. Investigation was postponed pending a meeting of DHS supervisory personnel and petitioner Padley regarding the Snells. No written records of the investigation were made, contrary to DHS policy. Snell, 920 F.2d at 679; 682 (Appendix 1 at 25; 39).

The meeting regarding the Snells took place on August 12th. Afterwards, Asbury told petitioner Levingston to contact the local police department regarding Clark Snell. At Levingston's request, Police Detective Einhorn met with petitioner Swepston and Mary Asbury at DHS on August 14th. Einhorn testified that among the concerns expressed in the meeting was the allegation that a large number of children and adults were entering and leaving the Snells' house at all hours.

> The lower court viewed this meeting as "the genesis of the pornography and prostitution suspicions." Snell, 698 F. Supp. at 1550.

Snell, 920 F.2d at 680 (Appendix 1 at 27-28).

Einhorn asked FBI agent Leslie Treece to contact petitioner Levingston regarding "complaints regarding possible child pornography or prostitution, or something unusual going on at the Snells' house." Agent Treece testified that the first time she heard allegations concerning child pornography or prostitution in relation to the Snells was when she met with petitioner Levingston at DHS. Snell, 920 F.2d at 679-80 (Appendix 1 at 24-30).

In the summer of 1987, the FBI in Oklahoma City had received a request from another FBI district to contact Clark Snell because he had made a report to the FBI that a person who stayed temporarily at the Jesus House was suspected of using his children for prostitution. The FBI had taken action against the suspect, and the agent in Oklahoma City was requested to ask the person who made the report some questions about the suspect. FBI agent Leslie Treece interviewed Clark Snell for that purpose. There was never any allegation that the Snells were involved in such activity, and DHS was

well aware that the Snells were never the subject of the FBI investigation. Snell, 920 F.2d. at 680 (Appendix 1 at 29).

Although no new reports about the Snells had been received, by August 19th petitioners were directing their efforts toward getting a pick-up order for the children in the Snell home. Toward that end, the Oklahoma guardianship statute was discussed at a meeting at DHS attended by Asbury, Swepston, Sieck and Levingston. Levingston took a copy of the statute to the local police station, but the police refused to pick up the children based on the guardianship statute. Asbury called one of the juvenile judges seeking an order, but he advised her that he would have to speak to a worker in person before taking any action. Snell, 920 F.2d at 682 (Appendix 1 at 36-39).

The evening of August 19th, petitioners Levingston and Sieck went to respondents' neighborhood and observed their house from the house of their next-door neighbors. From there, Sieck and Levingston called Judge Brown regarding issuance of a pick-up order based on the guardianship statute. The judge told them that if they believed there was an emergency, he would contact the police regarding a pick-

up order. After calling petitioner Padley, who told petitioners that she did not believe the children could be picked up on the basis of the guardianship statute, Levingston and Sieck went home without taking any further actions. Id.

The following day, Sieck took the guardianship statute to one of the assistant district attorneys requesting a pick-up order. In response to this request, the team leader of the Juvenile Division, Rebecca McNeese, wrote a memorandum to the DHS court liaison expressing displeasure at the DHS attempt to "shop" for a district attorney who would issue a pick-up order given the lack of written evidence. Snell, 920 F.2d at 682-83 (Appendix 1 at 40).

Around August 24th Asbury provided Levingston with a copy of the Oklahoma Child Care Facilities Licensing Statute which includes the words "upon conviction". Levingston took the statute to the district attorney's office for an interpretation of its application to the Snells, but was advised by the DHS liaison of the memorandum from McNeese regarding the Snell matter. With the permission of Swepston and Sieck, Levingston discussed the statute with Judge

Brown. She then asked Detective Einhorn to talk with Judge Brown to confirm her understanding that the language "upon conviction" in the licensing statute meant that the Snells could be arrested. Snell, 920 F.2d at 683 (Appendix 1 at 41).

Einhorn talked with Judge Brown on the telephone about the Snell case on August 26th. He later went to the judge's office, but the judge was on the bench. Einhorn stated that he was told Judge Brown wanted an application from DHS before issuing an order. In a telephone conversation with Padley, Judge Brown asked her to coordinate the factual information in the case and prepare an application. Padley had two conversations with Detective Einhorn on August 26th. She also talked with Swepston, Sieck and Levingston and with Judy Collins of the licensing division regarding "getting an order to force the Snells to cooperate as it relates to licensing and looking at papers and things like that." Collins advised her that if licensing was the only issue, another visit to the home to request information was appropriate, rather than a court order. Snell, 920 F.2d at 684 (Appendix 1 at 46-47). Padley prepared the subject

application describing alleged reports about the Snells and asking the help of the court in completing child abuse and licensing investigations. She took the application to Judge Brown's office. Based primarily on the allegations of child prostitution, child pornography and denial of access, he prepared the Ex Parte Order. Padley delivered the Application and Ex Parte Order to the DHS Child Welfare Division where they were reviewed by petitioners prior to the entry into respondents' home which is the subject of this action. Snell, 920 F.2d at 677; 684 (Appendix 1 at 12; 48).

At the hearing which commenced the day after the children were removed from the Snell home, petitioners could present no evidence to support the allegations of child prostitution or child pornography. Detective Einhorn testified that the only allegations of nefarious sexual activity in the Snell home that he had received came from petitioners Sieck and Swepston and Mary Asbury. Snell, 920 F.2d at 686 (Appendix 1 at 56).

In affirming the decision of the district court denying absolute immunity to petitioners, the Tenth Circuit Court of Appeals cited with approval the opinion of the district court which states:

> While the tasks of social workers who investigate child protection matters are clearly matters of compelling interest and importance to the public, how can it be said that when these investigators allegedly violate a citizen's constitutional rights they are entitled to absolute immunity, when highly trained FBI, DEA and Treasury agents facing identical allegations are entitled to only qualified immunity?

Snell, 920 F.2d at 691 (Appendix 1 at 82).

SUMMARY OF ARGUMENT

The opinion of the Court of Appeals for the Tenth Circuit is consistent with the decisions of this Court granting absolute immunity to public officials based on the functions performed by those officials. In this case, neither the social workers nor the assistant general counsel of the Oklahoma Department of Human Services followed the Oklahoma Statutes or the regulations of the Department of Human Services in regard to child protective services and the licensing of child care facilities. Petitioners were performing investigatory functions similar to the duties of police officers. They were not taking actions

which were an integral part of the adjudicatory process and therefore are not entitled to absolute immunity. In filing the application with the juvenile court requesting assistance in completing child abuse and licensing investigations, the assistant general counsel of the Department of Human Services acted without precedent or statutory authority and is not entitled to absolute immunity.

Petitioners cite opinions of the Courts of Appeals for the Ninth and Fourth Circuits which grant absolute immunity to social workers. The decisions in those cases reflect that the social workers involved took action which initiated the adjudicatory process. Those actions were consistent with their duties as child protective workers under the statutes of the states involved. In the instant case, the Oklahoma Statutes provide that employees of the Oklahoma Department of Human Services shall investigate allegations of child abuse and neglect and report their findings to the district attorney. The district attorney is authorized to take action to initiate the adjudicatory process, not the employees of the Oklahoma Department of Human Services. The apparent conflict between the decision of

the Tenth Circuit in this case and the decisions of the Ninth and Fourth Circuits is based in substantial part on the differences in the statutory duties of the child protective workers involved. This is not an appropriate case for review by the Supreme Court of the United States.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

A.

THE OPINION OF THE COURT OF APPEALS FOR THE TENTH CIRCUIT IS CONSISTENT WITH THE RULINGS OF THIS COURT ON THE ISSUE OF ABSOLUTE IMMUNITY

The statement in the Petition for Writ of Certiorari at p. 30 that the Tenth Circuit's reliance on allegations of fraud in denying absolute immunity conflicts with decisions of this Court is not correct. This Court has held that claims of absolute immunity from suit are not defeated by the presentation of false evidence by a prosecutor, Imbler v. Pachtman, 424 U.S. 409 (1976); or by false testimony on the

part of a witness, Briscoe v. LaHue, 460 U.S. 325 (1983); or by acts of a judge done maliciously or corruptly, Bradley v. Fisher, 13 Wall. 335, 351 (1872); Stump v. Sparkman, 435 U.S. 349 (1978), but the reason for providing absolute immunity in such cases is to protect the smooth functioning of the judicial process. The Tenth Circuit opinion denied absolute immunity to the non-attorney petitioners in this case not because of allegations of fraud, but because petitioners' acts were not an integral part of the judicial process. Instead, petitioners' actions were of an investigative nature similar to actions of police officers. While petitioners are correct that the court stated, "the summary judgment evidence indicates that these defendants assisted or acquiesced in the use of information known to be false concerning the Snells," the remainder of the sentence, "in order to further the licensing investigation" is the substance of the matter which is crucial to the ruling on absolute immunity. In addition to finding that the petitioners' actions were investigatory, the court found that petitioners were not acting as functionaries of the court;

> . . .[T]he application which resulted in the pick-up order was pre-adjudicatory and sought information

> which would be developed in other pre-adjudicatory procedures such as court intake or a preliminary inquiry that occur prior to the filing of a petition.

Snell, 920 F.2d at 690 (Appendix 1 at 78).

As to petitioner Padley, an assistant general counsel for DHS, the Tenth Circuit found that the summary judgment evidence did not show that she originated or augmented the false information. The court denied her claim of absolute immunity because she acted without any authority in preparing and submitting the application which included the false information. See Stump v. Sparkman, 435 U.S. 349 (1978). Padley took an unprecedented action to override the decision of the district attorney's office not to act. Snell 920 F.2d at 696 (Appendix 1 at 104). The exercise of discretion by a prosecutor in filing or not filing an action is protected by absolute immunity. Imbler v. Pachtman, supra. That Padley's unprecedented action to counter and supersede the discretionary decision of the prosecutor was determined by the Tenth Circuit not to warrant absolute immunity is not in conflict with the decisions of this Court.

B.

BECAUSE PETITIONERS DID NOT ACT ACCORDING TO OKLAHOMA LAW, THIS CASE IS NOT AN APPROPRIATE ONE ON WHICH TO BASE A RULING BY THIS COURT ON ABSOLUTE IMMUNITY FOR SOCIAL WORKERS

Consistent with the ruling of this Court in Butz v. Economou, 438 U.S. 478 (1978) and Forrester v. White, 484 U.S. 219 (1988), the Tenth Circuit used the functional approach in deciding the immunity issue. Under Oklahoma law and the procedures of the Oklahoma Department of Human Services, the district attorney and not a child welfare worker is responsible for initiating and prosecuting actions to protect children; the district attorney or the attorney general is responsible for prosecuting actions under the Child Care Facilities Licensing Act. DHS social workers, on the other hand, have responsibility for investigating allegations of child abuse and neglect and for licensing child care facilities. However, petitioners did not follow the relevant provisions of the Oklahoma statutes or the procedures of DHS in carrying out their duties in the instant case. The Oklahoma Statutes at 10 Okla. Stat. §§1101(10), 1103(A)(B)(C) require that a preliminary inquiry be conducted before a child is taken

into custody, and if further action is necessary, a petition may be filed by the district attorney or other authorized person. In this case, the district attorney found there was no evidence to support further action, but petitioners proceeded to take action nevertheless. Snell 920 F.2d at 689 (Appendix 1 at 75).

The DHS Child Welfare Services-Child Abuse/Preventive Services Procedures §§622.4, 623.6(D), 623.7(A) provide procedures for investigating reports of abuse and neglect, recording information and immediately informing caretakers of allegations. These procedures were not followed in this case. Snell, 920 F.2d at 679, 682 and 685-86 (Appendix 1 at 25, 39, 55).

The Oklahoma Statutes at 10 Okla. Stat. §§408-09 provide that the enforcement of violations of the Child Care Facilities Licensing Act shall be carried out by the Attorney General of Oklahoma or by a district attorney. In addition, petitioner Padley was told by the DHS employee of the licensing division that a further field visit to respondents' home, and not a court order, would be appropriate to investigate a licensing issue. However, petitioners

chose to seek a court order nonetheless. Snell, 920 F.2d at 684, 689 (Appendix 1 at 46, 73-74). Because petitioners did not follow the Oklahoma statutory and administrative procedures, this case is atypical and not an appropriate one upon which to focus when considering conflicting decisions of circuit courts on the issue of absolute immunity for social workers.

The statement in the Petition for Writ of Certiorari at p. 28 that the Tenth Circuit, "acknowledged that applicable Oklahoma Statutes did not prescribe any procedure for seeking or securing pre-adjudicatory orders from the juvenile court . . ." is an overstatement. What the Tenth Circuit said was that based on review of the statutory scheme, "we are inclined to agree that the procedure for obtaining a pick-up order was not entirely clear." Petitioners omitted the language that follows which is dispositive:

> However, at the time of the events in question, it is uncontroverted that normal procedure resulted in this function being handled by the police or the district attorney, not DHS.

Snell, 920 F.2d at 695 (Appendix 1 at 102-03).

The Court held that in this case, DHS clearly lacked authority to apply directly to the court for emergency investigative assistance or custody. Snell, 920 F.2d at 695 (Appendix 1 at 104). The facts of this case do not present a fair or accurate description of child protective services conducted according to the statutory and administrative procedures of the State of Oklahoma. For that reason, this case is not an appropriate one for the Court to review to determine whether social workers participating in child protective proceedings are entitled to absolute immunity.

C.

THE CONFLICT IN THE DECISIONS OF THE CIRCUIT COURTS IS DUE IN SUBSTANTIAL PART TO DIFFERING STATE STATUTES REGARDING CHILD PROTECTIVE PROCEDURES

Finally, petitioners argue that the Tenth Circuit's treatment of social workers involved in seeking pre-petition orders from the juvenile court conflicts with the Ninth Circuit's decisions in Myers v. Contra Costa County Dep't. of Social Serv., 812 F.2d 1154 (9th Cir. 1987), cert. denied, 484 U.S. 829 (1987) and Coverdell v. Department

of Social and Health Serv., 834 F.2d 758 (9th Cir. 1987) and the decision of the Fourth Circuit in Vosburg v. Department of Social Services, 884 F.2d 113 (4th Cir. 1989). In Myers, the court found the social case work specialist, whose responsibility included the initiation and pursuit of dependency petitions in cases of suspected child abuse and neglect, was absolutely immune from suit for actions taken in connection with bringing a dependency proceeding. However, the worker was not entitled to absolute immunity for actions which preceded the institution of judicial proceedings, i.e. his order to the father of the children to stay away from home until the judicial hearing could take place.

In Coverdell, the Ninth Circuit relied on its holding in Myers and granted absolute immunity to a child protective services worker (McLaughlin) who prepared an affidavit stating the reasons she believed a new-born child would be in danger if she were to reside with her parents. Based on the worker's affidavit, the county court granted the motion filed by the prosecutor for an order directing that the child be taken into protective custody. In affirming the trial

court's finding that the social worker was entitled to absolute immunity, the Ninth Circuit found that McLaughlin was performing quasi-prosecutorial functions connected with the initiation and pursuit of child dependency proceedings consistent with her duties under the Washington Statutes which state that child protective workers have the duty to investigate possible child abuse or neglect, to report to a law enforcement agency and where necessary, to refer such report to the court. The court concluded:

> Because McLaughlin's actions in seeking and obtaining a court order were within the scope of her statutory authority as a quasi prosecutor, she is entitled to absolute immunity from civil liability for her quasi prosecutorial conduct.

Coverdell, 834 F.2d at 764.

The Oklahoma Statutes direct the county offices of DHS to investigate allegations of child abuse and neglect according to the priority guidelines DHS has established. If the county office finds evidence of abuse and neglect, the statute directs that the findings be forwarded to the district attorney's office in the county wherein the suspected injury occurred together with the DHS recommendation as

to disposition. 21 Okla. Stat. §846 (Appendix 3 at page 6). The scope of the statutory duties of social workers investigating child abuse in the State of Washington is broader than that provided by the statutes of the State of Oklahoma, since social workers in the State of Washington are authorized to make direct referrals to the court. As a result, the petitioners herein and the social workers in the cases of Myers and Coverdell are not similarly situated.

In Vosburg, supra, the mother of a child disobeyed court orders to cooperate with social workers and provide visitation for the child with her father. One of the social workers filed a petition for preliminary removal order and the child was taken into custody and placed in a foster home. In the mother's civil rights action, the trial court granted summary judgment in favor of the social workers, finding that they were functioning as prosecutors and entitled to absolute immunity. The Court of Appeals for the Fourth Circuit affirmed citing Myers, supra, and reasoning that under Virginia law, the filing of a removal petition is, in essence, the start of judicial proceedings against the parent or guardian of a minor child, and the

duties of the social worker at that point are those of an advocate in that process. Vosburg, 884 F.2d at 137. The court in Vosburg was careful to emphasize that the grant of absolute immunity applies only to activities of social workers that could be deemed prosecutorial and added that the decision should not be read as holding that social workers are immune from liability arising from their conduct in investigating the possibility that a removal petition should be filed. Vosburg, 884 F.2d at 138.

In Austin v. Borel, 830 F.2d 1356 (5th Cir. 1987), social workers filed an allegedly false verified complaint that resulted in a child being removed from the parent's custody. The court found that under Louisiana law, social workers are authorized to investigate allegations of child abuse and report their findings to the district attorney, and that they may also file a verified complaint indicating there are reasonable grounds to believe a child should be taken into custody. "Issuance of an instanter order upon the filing of a verified complaint initiates custody, but only filing the petition itself initiates the adjudication process." Austin, 830 F.2d at 1361. The court held

that the filing of a verified complaint was functionally comparable to a police officer seeking an arrest warrant and that under the functional approach to immunity, the social workers were not entitled to absolute immunity.

In the instant case, the Tenth Circuit found that the statutory scheme in Oklahoma is similar to that in Louisiana and that social workers seeking a pre-petition custody order function like police officers seeking an arrest warrant. Snell, 920 F.2d at 690 (Appendix 1 at 79). The differences in the circuit court rulings on absolute immunity for social workers are based in significant part on differences in the statutory duties of the social workers involved. This case does not involve disparate treatment for persons similarly situated.

CONCLUSION

The petition presents no issue warranting review by this Court. Respondents respectfully pray that this Court deny the Petition for Writ of Certiorari.

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